Supreme Court, U. S.
FILED
NOV 8 1976
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-644

WILLIAM F. BUCKLEY, JR.,

Petitioner,

v.

FRANKLIN H. LITTELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WILLIAM F. BUCKLEY, JR. (hereinafter "petitioner") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals of the Second Circuit herein.

Opinions Below

The opinion of the Court of Appeals (OAKES, *C.J.*) is not yet reported. It appears in the appendix to this petition at pp. 4599-4628. The opinion of the District Court (GRIESA, *D.J.*) is reported at 394 F. Supp. 918. It appears in the appendix to this petition at 1a-117a.

Jurisdiction

The opinion of the Court of Appeals was entered on June 30, 1976. A petition for rehearing, filed within the time al-

lowed by the rules of the Court, was denied on August 13, 1976. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254 (1). The District Court had diversity jurisdiction, 28 U.S.C. §1332.

Questions Presented for Review

1) Does the First Amendment as construed by this Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and successor cases, require, in a diversity case, that material allegedly defamatory of a public figure be construed leniently to the defendant in determining whether or not the material is defamatory, despite applicable state law that the material be construed according to what it would mean to the ordinary reader?

2) Does any doctrine of charity, or any doctrine of special lenience, require that when the meaning of a passage is allegedly doubtful the Court, contrary to state law, in construing the passage, substantially disregard the context in which the passage appears when that context clarifies any "imprecision" in the defamatory passage, and that the Court, on the contrary, in construing the passage, rely on sources not available to the reader?

Statement of the Case

Petitioner, stipulated to be a "public figure", brought an action in libel against respondent, author of a book entitled *Wild Tongues.* The book described petitioner as a "fellow traveler" of "fascism", purveyor of fascist material, and a lying journalist. The District Court, relying on the very specific definitions which the book itself gave of the allegedly defamatory words, upheld petitioner with respect to these three alleged libels and granted judg-

ment of $7,500 in punitive damages and $1 in compensatory damages. The ensuing description of the District Court's opinion is our statement of the facts.

The Court of Appeals, citing "constitutional imperatives" flowing from *Times* (p. 4608) and also the "charity" which it said "the Constitution requires," (p. 4614) applied definitions derived not from the book but from other sources, reversed as to the first two of the libels on the ground that they were not defamatory and affirmed as to the third. The Court reduced the punitive damages from $7,500 to $1,000.

The Decision of the District Court

The District Court stated the facts fully. The parties are identified at 9a-14a; cf. pp. 4603-4605.*

The respondent, in 1969, published a book entitled *Wild Tongues.* The purpose of the book was declared to be to enable its readers to identify "totalitarian organizations and philosophies, both of the right and of the left" (20a). On the jacket cover the book is described as "an incisive guide to the extremist groups now eroding the life of the church", "to [enhance] an understanding of the political and religious threats posed by both far right and left." The table of contents refers, *inter alia,* to "Totalitarianism on Campus" (p. 27), "Thunder on the Right" (p. 35), "Deceiving the Gullible" (p. 48), "The Fellow Traveler" (p. 50), "The Fascist International" (p. 52). Chapter II is entitled "How to Identify Totalitarian Movements" (p. 59).

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* Pages in the book *Wild Tongues* are identified in this petition as "p." and run from p. 1 to p. 173; pages in the opinion of the District Court are identified with an "a" after the number, and run from 1a to 117a; pages in the opinion of the Court of Appeals are identified as "p." and run from p. 4599 to p. 4628.

The passage referring to petitioner reads in part as follows:

"The Fellow Traveler

> Whisking about the edges of any totalitarian movement is the 'fellow traveler,' pirouetting into the whirlpool and out again as the vortex draws more powerfully and then recedes. His role is as dangerous to social health and as important to building up totalitarian parties as the equally ambiguous figure of the pseudo-conservative. The fellow traveler to the Communists or fascists is a fascinating psychological study: fascination with brute force and its misuse plays an important role. Students of communism have commented at length upon the part member's 'psychology of the pawn'—his need to be misused and abused, to the destruction of his own personhood. The fellow traveler's responses are essentially feminine, registering the ambivalence of love and hate toward the master and mover.
>
> The fellow traveler refuses to accept discipline and is therefore both used and despised by the party leaders. At the same time, he is dangerous to political movements and republican institutions of integrity, because he functions as a deceiver. He appears at times to be independent, but, when a major issue is at stake, he follows the party line.
>
> Perhaps the most famous type in recent years was Von Ribbentrop, pseudo-intellectual and champagne salesman, who was of great use to the Nazi government in giving an aura of respectability to international policies which, without a debonair front, might have been recognized readily for what they were: simple thuggery.

> In America, the outstanding representative of this function is William F. Buckley, Jr., editor of *The National Review* and perennial political candidate . . . *The National Review* and his syndicated newspaper column, 'On the Right,' frequently print 'news items' and interpretations picked up from the openly fascist journals . . ."

This part of the passage appears on pp. 4601-4602 of the opinion of the Court of Appeals and at 4a-7a of the opinion of the District Court. The passage continues at some length. However, the questions raised by this petition will apply only to the part quoted above.

The quoted part will hereinafter be referred to as "the passage" or "the allegedly defamatory passage."

The passage is followed by an assertion that Buckley is "like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds". P. 4602; 7a. The Court of Appeals upheld the District Court in finding this assertion actionable. P. 4626.

The context of the book relating to the defamatory passage was "charitably" * disregarded by the Court of Appeals, although it had been the basis of the decision of the District Court and petitioner's argument in the Court of Appeals. The District Court described the context in detail. Following are quotations with references to the pages of the opinion at the end of each quotation:

> "A reader of *Wild Tongues* would obviously not read the 'Fellow Traveler' section in isolation. The meaning of this section to him would be colored by what is

* We say "charitably" in the light of footnote 6, p. 4614, where the Court said that such an attitude was required by the Constitution. Actually the Court gave no explicit explanation of its minimal reference to the context.

said in the rest of the book about such subjects as totalitarianism, fascism and the role of the fellow traveler.* These other references serve to emphasize the depth of the evil with which Buckley is being charged. They also show that what is said about Buckley in the 'Fellow Traveler' section is not merely a string of loose epithets. Indeed the book undertakes to make a kind of scientific definition of fascism in America, and to fix Buckley and others in their relation to such fascism.

"The dust jacket of *Wild Tongues* describes the book as follows:

> "'. . . Franklin H. Littell both defines the enemies of liberty and self-government . . . [He] supplies a checklist by which the pathological organization can be recognized.'" [Ellipses indicate omissions by petitioner from Court's quotation of dust jacket.) (27a-29a)

> ". . . a subchapter entitled 'Thunder on the Right' announces that 'the most dangerous internal challenge to America comes from the fascist wing' (p. 35). . . . There is the following passage (p. 36):
>
> > 'The pseudo-conservative follows the lead of the demagogues, with a frenzy of unrestrained attacks on public policy and a minimal offering of constructive alternative proposals. . . . Tearing and rendering public confidence in the Constitution (and Bill of Rights!) where he can, his style is conspiracy, and his stench is disloyalty. The pseudo-

* These two sentences state the primary issue between the District Court and the Court of Appeals. The latter Court in substance disregarded the "rest of the book."

> > conservative is the 'patsy,' the fellow traveler to the fascists; the genuine conservative is their mortal enemy.'" [petitioner's omission] (30a-31a)

"Littell apparently believed it important that the extremist right-wing groups he was denouncing be labeled as 'fascist' in order to prevent any misunderstanding as to their true nature. Thus the following passage appears (p. 60):

> 'So too with the term "radical right"; the phrase is preferred by some writers who do not want to apply the precise rubric, which is fascism. "Fascism" was the term chosen by the oldest movements of right-wing takeover, when Mussolini and his thugs betrayed the legitimate government of Italy in 1922, terrorized and destroyed all dissenting groups, and established the model followed with adaptations by Hitler, Franco, Peron, and a host of subsequent lesser lights. "Fascism" is the term to apply to parallel movements and systems today, even though specialists note technical differences between Italian fascism, German Nazism, Spanish Falangism, and other radical right movements.'" (33a-34a)

"The book goes on to state that, by means of Littell's analytical method, 'totalitarian conspiracies and actions can be defined by law as precisely as murder, arson and rape and . . . such definition is overdue' (p. 71). The book states that by this method it is possible to identify 'organizations and parties and systems which have opted out of the life of dialogue, which are not in good faith in public meetings, and have in fact drawn the knife against all who stand in the way of their drive for power' (pp. 64-65). On the subject of fellow traveling, the book has this to say (p. 68):

'On the practical side, it is now perfectly possible to distinguish honest liberalism from fellow-traveling with the Communists, and honest conservatism from fellow-traveling with fascist-type movements. . . ." (34a-35a)

"Littell describes fifteen 'theoretical' identifying marks of totalitarianism (pp. 72-91) and sixteen 'practical' characteristics of totalitarianism (pp. 95-111). I will only mention a few of these as illustrations of what Buckley is connected with when he is labeled as a fellow traveler of the fascist brand of totalitarianism." (35a)

"Littell starts each list with anti-Semitism (pp. 72, 95). Under the heading 'The Politics of Polarization', Littell states that totalitarians are 'destructive of the rules of the dialogue and of the constitutional order itself', and intend 'not orderly change but transfer of power by reversion to the law of the knife' (pp. 74-75) . . ." (35a-36a)

"Under the heading of 'The Cult of Violence' there is a statement that 'the praise of violence towards the opposition is fundamental' . . . (p. 82) . . . It is further stated that 'amateur agents' have created 'a new style of treason in our time,' specializing in the 'fifth column,' which destroys constitutional order and trust, and which develops 'large networks of espionage, subversion and conspiracy' (p. 83) . . ." (36a-37a)

"The book states that in totalitarian politics, 'Symbols of sadism and violence are approved' (p. 108). It is said that 'vulgar and vicious forms of sedition are encouraged by disloyal public officials, with unpunished arson and murder the results' (p. 108). The book asserts that totalitarian supporters revert to

primitive 'justice' in the form of mob demonstrations, mob violence, and the takeover of legitimate organizations by various pressure tactics (pp. 108-9)." (38a)

"The ultimate recommendation is that totalitarian groups in America be exposed as conspiratorial and subversive and be outlawed (p. 113)." (38a)

The District Court summarized its interpretation as follows (42a):

"The alleged libelous passage regarding Buckley, taken in the context of other relevant portions of *Wild Tongues,* makes accusations against Buckley of a profoundly serious nature. It not only labels him as the outstanding representative in this country of the function of fascist fellow traveler, but it spells out in considerable detail the specific evils with which such a fellow traveler is associated. These include disloyalty to the government of this country, advocacy of conspiratorial overthrow of the government, devotion to violence and disruptive tactics for the subversion of our institutions, including churches."

The Court said further at 43a:

"But the evils I refer to here are emphasized repeatedly through the book as being the basic identifying characteristics of fascism. I believe it is inevitable that a reader of the book would take it to mean that Buckley—as the alleged outstanding fellow traveler of fascism in America—subscribes to these basic evil tenets."

The Court continued at 56a:

"In drawing this important distinction between the genuine conservative and the fascist or the fascist

fellow traveler, Littell in *Wild Tongues* gives his extensive elaboration of the meaning and identifying characteristics of fascism—disloyalty to the government, advocacy of violence, disbelief in democratic institutions, desire for a totalitarian state, contempt for individual liberties, and so forth. I have already concluded that a normal reader would take the book to mean that Buckley—the alleged 'outstanding' fascist fellow traveler in America—was knowingly associated with these basic purposes."

The Court also said at 61a:

"Moreover, the book is careful to indicate that the specific evils described therein relate to fascism, and *not* to something less dangerous—such as the radical right." (emphasis in original)

The Court granted judgment for the plaintiff in the amount of $7,500 punitive damages and $1 compensatory damages. (117a)

The Decision of the Court of Appeals

The Court of Appeals reversed on the ground that the quoted passage was not actionable as regards "fellow traveler" of "fascism" and user of items from "openly fascist journals" because the terms were so "debatable, loose, and varying [as to] be insusceptible to proof of truth or falsity" (p. 4621, 4623).

Its thesis was that *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and successor cases have superseded state law as to the interpretation of allegedly defamatory material.

The New York law was correctly stated by the Court to be that "courts will not strain to interpret commentary in its mildest and most inoffensive sense. *Mencher* v. *Chesley*, 297 N.Y. 94, 99 (1947). The test applied to determine whether a passage is libelous was rather what the overall effect would be upon an ordinary reader. *Everett* v. *Gross*, 22 App. Div. 2d 257 (1st Dept. 1964)." Pp. 4607-4608.

The Court then remarked that since *Times* "the law of defamation has in effect been rewritten in the light of constitutional imperatives." P. 4608. Later, referring to the assertion in the book, quoted supra p. 7, that the precise term for right wing extremism was not "radical right" but "fascism", the Court commented (p. 4614):

> *"Viewed more charitably, as the Constitution requires,* the overall passage may be interpreted to mean that the 'radical right' may tend to be subsumed in 'fascism' as a particular movement takes shape." (emphasis supplied)

In its charity or special lenience the Court in substance disregarded the book's own definitions of fascism and fellow traveler, contrary to New York law. *Balabanoff* v. *Hearst Publications, Inc.*, 294 N.Y. 351 (1945); cf. Restatement of the Law of Torts, § 563, subdivision d.

The Court of Appeals scornfully characterized, in footnote 4, p. 4612, petitioner's demonstration at pp. 3 and 10-20 in the "Brief for Appellee" of the book's definitions of "fellow traveler" and "fascism". The Court referred to that demonstration as a "facial absurdity". P. 4612.*

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* The Court of Appeals also asserted in footnote 4, referring to the Brief for Appellee at pp. 3 and 10-20, that "On appeal, appellee's brief goes quite a bit further than did appellee in his testimony and somewhat further than the court did in its opinion below by

What the Brief for Appellee (i.e. petitioner's brief in the Court of Appeals) had said at p. 3 was, in part:

> "Whatever might be the legal effect of terms such as 'fellow traveler' and 'fascism' *per se*, or used in isolation, in this particular instance the issue was whether Buckley was defamed by being described as the 'outstanding representative' of fascist fellow travelers in accordance with the explicit definitions of those terms in the book, the purpose of which was declared by Littell to be a guide to political extremists, in the interest of clarifying polemical discussion and persuading Christians to avoid them. The question thus, by virtue of these definitions, becomes whether Buckley was fascinated by brute force and its misuse, functioned as a deceiver, followed the party line, lent an aura of respectability to simple thuggery, approved or condoned totalitarianism, sadism and violence, the burning of synagogues, the defacement of Jewish buildings, the 'use of the knife' etc., these being among the characteristics of fascists and their fellow travelers. Book, pp. 50-51, 95-115; *infra* pp. 10-20."

By reason of limitations of space we refer only to the following description of the context made between pp. 10 and 20 (especially pp. 15-16) of the Brief for Appellee in the Court of Appeals:

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assimilating to the book's appellation of Buckley as a 'fellow traveler' all the evils associated with the Nazis." In fact, this "assimilation" at pp. 10-20 was taken almost word for word from a memorandum on the subject submitted by petitioner to the District Court in response to that Court's request for a memorandum as to how "fascism" was defined by the book itself. The District Court's opinion shows that he confirmed the validity of this memorandum, often using in his opinion general statements rather than the detailed ones of the memorandum.

The totalitarians* "have in fact drawn the knife against all who stand in the way of their drive for power" (p. 65). This idea is reiterated at pp. 75 ("reversion to the law of the knife"), 102 ("the rule of the knife"), 103 ("the rule of the knife"), 112 ("those who . . . use the knife"), and 125 ("revert to the old rule of the knife"). They are "flesh eaters" (pp. 43, 72), to be suppressed by violence to the extent necessary (p. 72; see also p. 119). Or again, nicely avoiding endless repetition, they are "well poisoners" (pp. 42, 85), or "grave diggers" (p. 85).

The addiction of totalitarians and fascists to anti-Semitism is strongly stressed (pp. 9, 10, 72, 95, 96, 98, 99, 141, 142, 148, 155, 169, 172); "totalitarian groups engage in the bombing of synagogues, defacement of Jewish buildings and cemeteries, slander of Jewish community leaders and public officials. . . ." (p. 95). Racism is also attributed to the fascists and totalitarians (pp. 10, 25, 56, 111), as is demagoguery (pp. 20, 36, 89, 100, 116, 117, 118, 119).

The fascists and totalitarians are accused of "political pornography" (pp. 66, 124), "irreverence, slander, lying, deceit, violence, conspiracy, schism" (p. 15), "betrayal of the people" (p. 42), use of "the deliberate smear" (p. 50), "disrespect for the dignity and integrity and liberty of the human person and . . . brutal mistreatment of the person or group of dissenting conscience" (p. 76), approval of "brain-washing, mental and physical torture, and liquidation . . ." (p. 77), "praise of violence" and "delight in the use of brute force" (p. 82), "a new style of treason in our

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* The book continuously equates, as regards their political tactics, totalitarianism, fascism and Communism (e.g. pp. 21, 26, 33, 44, 60, 61, 67, 70, 91, 94, 105 and 115).

time" (p. 83), "espionage, subversion and conspiracy" (p. 83), "manipulation of mobs" (p. 84), destruction of reputations (p. 85), and "terrorization" (p. 85). They want to "loose the police or the stormtroopers upon protesting citizens" (p. 87); the concentration camp is "the symbol of the totalitarian system" (p. 87). "The cult of the renegades is cultivated" (p. 90). "Parades replace discussion, symbols (including slogans) replace reasoned discussion, street fighting and the rule of the knife mark the regression to the primitive short-cuts to consensus" (p. 103).

The screed [*i.e. Wild Tongues*] continues with references to "mob action" (p. 104), "symbols of sadism and violence" (p. 108), "cross burnings and lynchings" (p. 108), "vulgar and vicious forms of sedition" (p. 108), "unpunished arson and murder" (p. 108), "mob demonstrations, mob violence, and the 'trial' of public figures in mob assembly" (p. 108), "attack on constitutional government" (p. 109), "total revolution" (p. 110), "death to human liberty" (p. 112), "lust for power" (p. 112), "subversion" (p. 112), "ideological warfare" (p. 112), "those who strike at the vitals of civilized life" (p. 113), "passionate hatred and malice" (p. 119), "envy" (p. 119), "poisonous and cancerous . . . fascist propaganda" (p. 122), "subversive politics" (p. 124), "political adventurers" (p. 124; see also p. 138), "witch doctors" (pp. 124 and 128), "secret terror" (p. 146), "fear and smear" (p. 170), and "half truths and lies" (p. 170).

Altogether, and as illustrated above, the Brief for Appellee between pages 10 and 20 gave no fewer than 263 references to defamatory definitions of fascism* in *Wild*

* Equating as the book does, fascism and totalitarianism. Cf. footnote, *supra* p. 13.

Tongues, not counting those in the allegedly defamatory passage itself. The Court of Appeals, finding these references a "facial absurdity", made, apart from the allegedly defamatory passage itself and quotations by the District Court therefrom, only nine references to the specific pages of the book, all of the references being for exculpatory purposes (pp. 4612, 4613, 4614, 4616).

The explanation given by the Court in footnote 4 for its pejorative characterization of petitioner's Brief at p. 3 and 10-20 as a "facial absurdity" was largely that the book condemned Communism as well as fascism. With great respect, we are mystified as to the relevance of this comment. The Brief made no claim to the contrary, and we are unable to see how the subject bears upon the character of the disputed passage as defamatory or not. The Court perhaps had in mind that the Brief, at pp. 17-18, characterized as "peculiar and suspicious" that respondent chose to illustrate the term "fellow traveler" by an alleged fascist fellow traveler, the expression having originated and ordinarily being used with respect to Communist fellow travelers.

The Court relied for its determination of the meaning, or lack of meaning, of "fascism" and "fellow traveler", upon testimony given by petitioner (pp. 4612, 4613, 4614, 4617, 4618), by respondent (pp. 4613, 4615, 4616), on *Cafeteria Employees Local 302* v *Angelos*, 320 U.S. 293, 295 (1943) (p. 4620), and on Webster's Third International Dictionary (1971 ed.) (p. 4615) and The Harper Dictionary of Contemporary Usage (1975) (p. 4616). Obviously these sources were not readily available to readers. In *Cafeteria Employees* there were no definitions of fascism of any kind, let alone the kind of definitions given in *Wild Tongues*. Indeed *Cafeteria Employees* was not a libel case.

As to fellow traveler the Court did refer to the context at footnote 8, p. 4616.* Here the Court, on what we respectfully submit is somewhat tortured reasoning, concluded that a paragraph in the book asserts that the fellow traveler is only a person "easily cheated, imposed upon or otherwise victimized." The explicit definition of fellow traveler in the allegedly defamatory passage, *supra* pp. 4-5, is wholly inconsistent with the concept of a fellow traveler as merely one who is "easily cheated". Other references in the book are also inconsistent. At p. 42, the reader is referred to "the well-poisoners in America, notably the John Birch Society and fellow-travelers." At p. 66, we learn that: "On the practical side, it is now perfectly possible to distinguish honest liberalism from fellow-traveling with the Communists, and honest conservatism from fellow-traveling with fascist-type movements." At p. 115, the reader is told: "For the loyal Christian citizen, membership in or fellow-traveling with caucuses and conspiracies of a totalitarian type should be enough in itself to disqualify any person from holding public office." P. 130 refers to "fellow-traveling magazines" which "whirl in orbit about one of the totalitarian centers of disciplined action."

The Court of Appeals further said at footnote 11, p. 4620:

> "Judge Griesa in other words treated the alleged libel as if Buckley had been called a fellow traveler of

* At footnote 8, p. 4616, the Court of Appeals asserts that a definition "arguably directly contradicted . . . is not mentioned by the district court" as if to condemn the District Court for this omission. We respectfully submit that it is more striking that the Court of Appeals does not mention any of what are, in our view, some 250 arguably direct contradictions of its own finding. [Actually the District Court did observe and quote the paragraph in question (30a-31a, *supra* pp. 6-7), but did not observe any arguably direct contradiction.]

> the Fascists, or the Nazis, or the Falangists, or a mythical Fascist Party of America, quite another case than the one we have."

On the contrary, we submit that, as Judge Griesa demonstrated at 33a-34a, *supra* p. 7, that is exactly the kind of case we have by virtue of Littell's definition of fascism set forth in the quotation referred to there.

The Court also said at footnote 11 that: "It may be that the fundamental error of the District Court was accepting Buckley's own narrow and hence somewhat more precise definition of fascism as involving both anti-Semitism and the use of force to take control of the government." But the District Court, although referring to Buckley's definition, relied for his decision on the definitions of the book itself, as his opinion clearly shows. Indeed we have referred, *supra* p. 12, to the material describing the book in the Brief for Appellee at pp. 10-20 in the Court of Appeals as definitions being quoted almost word for word from a memorandum submitted to the District Court at his specific request for such a memorandum. As we see it, and respectfully submit, the Court of Appeals was somewhat misleading in saying that the District Court accepted Buckley's definition of fascism. Although the District Court did say that Buckley's interpretation was correct (23a), that his own conclusion was based upon the book itself is shown by the immediately following discussion (23a et seq.). Cf. *supra* pp. 5-6. The Court of Appeals itself so recognized with respect to the book's assertion that Buckley used material from "openly fascist journals", saying at p. 4623: "Rather, the court's construction came solely, apparently, from its reading of Wild Tongues."

The Court hence reversed the findings of the District Judge as to the libels relating to fascism, but affirmed the

judgment respecting lying. The Court reduced the damages from $7,500 to $1,000.

Reasons Relied on for Allowing the Writ

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals has found that the doctrine of *Times* and successor cases required that the interpretation of allegedly defamatory matter no longer be its meaning to the ordinary reader, but must be lenient, if not charitable to the publisher defendant.

There is no hint in *Times* or the successor cases that any change in the way to determine the meaning of an alleged libel has been made or intended. In *Greenbelt Cooperative Association* v. *Bresler*, 398 U.S. 6 (1970), the only successor case, so far as disclosed by our research, in which the meaning of the allegedly defamatory material was in issue, both opinions took for granted that the traditional rule applied. Thus, at p. 14 of its opinion, the Court said: "It is simply impossible to believe that a reader who reached the word 'blackmail' would not have understood exactly what was meant. . . ." And again, also at p. 14, "No reader could have thought. . . ." *Times* and its successor cases in this Court have given rise to a multitude of decisions in the state and lower federal courts. So far as our research has disclosed, none of these decisions has suggested that the decisions of this Court have required that a charitable or especially lenient meaning is to be used in construing allegedly defamatory material. Certainly no such case was cited by the Court of Appeals.

Although we do not dispute the rule of *Times*, or suggest that it be relaxed, we do submit that it should not be extended as regards the determination of meaning. The amounts involved in this particular litigation are not large, but the principle is most important not only to petitioner, but to public figures generally. In petitioner's case, the managers of both his TV program and his syndicated column testified that if respondent's characterizations of petitioner were to gain credence, neither his TV program nor the column could survive (49a). The City of New York is a great communications center, so that the ruling of the Court of Appeals of the Second Circuit are of national weight in the TV, radio and publishing industries, industries in which the law of libel is specially important. We submit that such a far reaching extension of the *Times* doctrine as that expressed in this case should be reviewed by this Court.

2. The Court of Appeals has decided a second important question of federal law which has not been, but should be, settled by this Court.

Does the rule, allegedly embodied in *Times* and successor cases, that the meaning of an allegedly defamatory passage must be determined charitably to the defendant, require that the context of the passage be substantially ignored, and the meaning determined, on the contrary, on the basis of evidence not readily available to the reader?

The New York law, following the American Law Institute, requires, if not overruled by *Times*, that the context be considered.

In *Balabanoff* v. *Hearst Publications*, 294 N.Y. 351 (1945), the Court said at p. 355:

> "[An article referred to plaintiff as secretary of the Soviet Cheka. The context described the Cheka in

highly derogatory terms.] . . . In the Restatement of the Law of Torts, section 563, subdivision d, it is stated: 'In determining the meaning of the communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. So, too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood. The context of the defamatory imputation includes all parts of the communication which are ordinarily heard or read with it.'" [The Court held that the context must be considered.]

Many other cases to the same effect are cited in Seelman, *The Law of Libel and Slander in the State of New York,* par. 160 (1964).

In this instance, for practical purposes, the Court of Appeals, presumably under the influence of the charity it felt required by *Times,* in substance ignored the context and relied on the testimony of the parties given at a trial many years later, on two dictionaries and on a case in which "fascism" had not been defined.

State law follows the rule of the American Law Institute that the context be taken into account, as we have already demonstrated. That rule has not been altered in the currently pending revision of the Restatement of the Law of Torts.* The Institute has, as the members of the Court are

* § 563, subdivision d contains several additional sentences, illustrative in nature, not quoted by the New York Court of Appeals. In Tentative Draft No. 20 minor changes in style, having no conceivable relation to any "constitutional imperative," were made in sentences not quoted by the New York Court of Appeals.

undoubtedly aware, recently been devoting its attention to the subject of libel and has drafted revised sections intended to give full effect to *Times* and successor cases.

The Court of Appeals itself so noted, referring at p. 4608 to, or paraphrasing, a statement by the Institute in Tentative Draft No. 21 that "the law of defamation has in effect been rewritten in the light of constitutional imperatives". As §563, subdivision d, has not been changed in this effort,* the Institute has not found the "constitutional imperatives" flowing from *Times* applicable to the proposition that the context be considered in determining the meaning of allegedly defamatory material.

The Institute's failure to change §563, subdivision d, has significance in that it said at pp. 3-4 of the same Special Note cited by the Court:

> "When a particular constitutional question was not specifically covered by decision or language of the (Supreme) Court, resort has been had to extrapolation of the principles stated in or deduced from the existing decisions. To the extent that this was not possible, a caveat was used." (No caveat was used with respect to §563, subdivision d.)

Obviously, the Institute has not regarded the proposition in question as affected by *Times* and successor cases.

* Cf. footnote p. 20.

CONCLUSION

A writ of certiorari should be granted.

New York, N.Y., November 4, 1976

Respectfully submitted,

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